No. 15063

United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. HENNESSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Montana

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ARGUMENT

It would appear from the argument set forth in Appellee's Brief that they are depending solely upon the fact that Appellant had had other diseases and injuries prior to the accident complained of in this Appeal to substantiate the finding of the trial court that the blood clot in question was not caused by the injury to Appellant in Pocatello, Idaho, on June 2, 1949. This matter has been very thoroughly discussed in Appellant's Brief on file in this Court. That Brief clearly points out the

legal, medical and scientific questions presented by this Appeal. We submit Appellee has not set forth any legal or medical reasons to support their position that the trial court's findings should be upheld. This is undoubtedly due to the fact that all of the evidence and law is against the Government's position.

It certainly cannot be seriously contended that the childhood diseases mentioned by Appellee had anything to do with the condition that occurred in Appellant's body and now exists and will continue for the rest of his natural life. The next point set forth by Appellee is the occurrence of pneumonia in 1934 and acute nephritis in 1934. The Appellee sets forth this disease as the possible cause of a condition that occurred 15 years later and in the very next paragraph of his Brief urges that Appellant's position is not tenable because the injuries occurred 7 months prior to the blood clot. We submit that this position of the Appellee is ridiculous on its face. Appellee then urges a recurrence of the nephritis in 1951 which we submit to be a false premise. The statement is based upon testimony adduced from the Appellant that according to Dr. Childs who was examiner for the Navy in Seattle that he had it. (Tr. p. 73.) This opinion of Dr. Childs' was based upon medical history rather than any objective findings. The Appellant had never been treated for nephritis from 1936 until the time of the trial. (Tr. p. 70.)

However, during the summer of 1941 the Appellant had taken the physical examination for the Air Corp

passing the same and flying for the C.A.A. during that time. Mere history of nephritis did not disqualify the Appellant at that time. (Tr. p. 31). From 1936 to 1941 the Appellant had been in sufficiently good health to be gainfully employed or carry a full college schedule without any necessity for medical treatment. No clinical findings of nephritis were made in the year 1941 and the Appellee has made no showing of the existence of the disease at that time. (Tr. pp. 31, 32.) We again submit that Appellee is contending that an occurrence of 15 years past could have caused the Appellant's condition but one of 7 months could not have. It becomes apparent that Appellee's sole effort is to cloud the issue.

The automobile accident next mentioned by Appellee occurred in 1947 and the Appellant was completely well at the end of six months. The next thing set forth is an accident by a Northwest Airlines plane in 1948 from which the Appellant's belly muscles were a little sore the next morning (Tr. p. 35) which condition was never noticeable after that morning even later the same day. These two incidents have certainly been tied up in no way whatsoever with the condition of Appellant. It is a reiteration of Appellee's claim "it is not remote for me but is for the Appellant."

We must bear in mind that at no time did the Defendant and Appellee plead any of these matters of defense affirmatively. The great part of the subject matter now relied upon by the Appellee was admitted by the trial court over the objections of counsel for the Appellant.

Not only are these matters completely remote and unconnected with the Appellant's condition but we submit they were inadmissable as matters of defense to begin with.

> Barron and Holtzoff's Federal Practice and Procedure, Section 279, at page 499.

Counsel for Appellee after setting up this smoke screen then attempt to justify the trial court's error by quoting very minute extracts from the very extensive medical testimony in the case. In so doing they completely ignore the careful consideration given this question in Appellant's original Brief and completely ignore the medical text quoted therein. They hope in this summary fashion to completely ignore the exhaustive study of the situation set forth in Appellant's Brief.

An examination of the medical testimony will show, with respect to the said vascular catastrophe, that all medical witnesses agree that the crippled condition of the appellant was the result of the blood supply to his legs being shut off by an embolus that blocked the circulation; that all known sources of the emboli, except traumatic, were eliminated because of absence of disease and the presence of healthy lungs, healthy heart, healthy blood vessels, absence of infection sufficient to produce an embolus. Further, appellant's witness, Dr. Horst, a physician of many years experience and one who had made an exhaustive study of the problem and a careful personal examination of appellant, testified to a completely logical and reasonable explanation connect-

ng the fall of Livingston upon appellant as the proximate, efficient and producing cause of the traumatic damage to the blood vessels which resulted in the propagation of the thrombus and dislodgment of the emboli which resulted in this damage to appellant.

The Appellee concludes with the statement that the automobile accident is as closely related as the accident now before the court. As has been repeatedly noted in the record and in the Briefs the injury from the automobile accident was strictly to the shoulder and was completely healed in six months at the very outside. Prior to the occurrence now before this court and after the accident in Pocatello, Idaho it must be noted that the Appellant complained of pain in his upper abdomen for a number of months as well as the pain in the right shoulder for which the trial court allowed him some compensation. See Page 21 of Appellant's original Brief stating in part as follows:

> "He also complained of pain in his upper abdomen of several months duration, which was worse on inspiration and on bending forward. This had become markedly aggravated the last few weeks before admission. (R. 132.) See also exhibit 1, St. Vincent's Hospital chart under record of complaints."

It is the contention of the Appellee that the trial court had the right to reject the testimony of Dr. Horst. We submit that the trial court did this arbitrarily and without right. As can be seen by the record the court of its own volition made efforts to discredit Dr. Horst's testimony in the course of the trial. This was not war-

ranted by the law applicable to the case.

> "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is only required, or that degree of proof which produces conviction in an unprejudiced mind."
>
> Sec. 93-301-4, R.C.M. 1947.
>
> "That in civil cases the affirmative of the issue must be proved and when the evidence is contradictory the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond a reasonable doubt."
>
> Sec. 93-2001-1, R.C.M. 1947, Subdivision 5.

The law applicable to this case and which the trial court saw fit to ignore is set forth by the Montana Supreme Court as follows:

> "The record contains no direct evidence from which it can be said that the injury was the proximate condition; this, not because of failure on the part of claimant properly to present his case, but because, on the frank admission of the doctors, no man on earth knows positively the exact cause of such an affliction in any given case; medical science has not advanced to a point where it can positively trace back from the effect and declare the cause of the disease in a given patient. But this fact alone need not bar the claimant from recovery, if, on the record, it can be said that he is entitled thereto.
>
> The law does not require the impossible; it does not require demonstration or such a degree of proof as, excluding the possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in the unprejudiced mind. (Sec. 10491, Rev. Codes 1921.) A fact may be established by indirect evidence, or

that which tends to establish the fact by proving another which, though true, does not of itself conclusively establish that fact, but which afford as inference or presumption of its existence. (Sec. 10497, Id.) Evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in the unprejudiced mind. (Sec. 10500, Id.)

Further, the solution of any issue in a civil case may rest entirely upon circumstantial evidence; the law makes no distinction as to the probative value of this class of evidence and direct evidence, and, if the circumstantial evidence in this case furnishes support for the claimant's theory, and thus tends to exclude any other theory, it is sufficient. (citing cases.) In this class of cases the rule is that the burden of proving that the injury was the proximate cause of the condition of the claimant may be proved by circumstantial evidence or inferences having a substantial basis in the evidence. (1 Honnold on Workmen's Compensation, 266, citing cases from Michigan, Illinois, West Virginia and Massachusetts.)

Moffett vs. Bozeman Canning Co., et al, 95 Mont. 347 at page 358, 26 P. (2nd) 973.

On this point see cases cited in Appellant's original Brief.

CONCLUSION

In conclusion we state there is but one cause as has been repeatedly said which is responsible for the wrecked physical condition of the Appellant and that is the fall of Livingston upon him on June 2, 1949.

Trauma and trauma alone to the large blood vessels produce this extensive, propagated thrombus which slipped off and caused the damage.

The District Court's decision, being clearly errone-

ous, this court is appealed to for the relief which Appellant is entitled to in this case.

Respectfully submitted,
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By .....

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